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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BARRY GREENFIELD, as Trustee, etc., Plaintiff and Respondent, v. THOMAS A. PORTER et al., Defendants and Appellants.	B286539 (Los Angeles County Super. Ct. No. BC642595)

APPEAL from an order of the Superior Court of Los Angeles County. Samantha P. Jessner, Judge. Affirmed.

Hill Farrer & Burrill, Michael K. Collins, Dean E. Dennis and Paul M. Porter for Defendants and Appellants.

John A. Henning, Jr., for Plaintiff and Respondent.

Thomas A. Porter and Landa and Lucile LLC[1] appeal from an order denying their motion to strike the complaint of Barry Greenfield, as trustee of the Landa Street Trust dated December 3, 2010 (Greenfield), under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[2] We affirm.

Greenfield's complaint asserts a claim for nuisance against Porter based upon Porter's design for a house that Greenfield claims will block his view. The nuisance claim relies upon Civil Code section 841.4, which classifies as a private nuisance any fence "or other structure in the nature of a fence" that exceeds 10 feet in height and that is "maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property." The complaint seeks declaratory relief and an injunction, alleging that an actual controversy has arisen as demonstrated in part by Porter's pursuit of building permits for his house.

Porter filed an anti-SLAPP motion, arguing that Greenfield's claim arises from the building permit process, which

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[1] The complaint in this case alleges that Landa and Lucile LLC is an entity controlled by Porter. Porter's declaration in the trial court states that Landa and Lucile LLC currently conducts no business and is an entity into which Porter ultimately intends to convey his properties at issue in this case. The relationship among the appellants is not significant to this appeal, and we therefore refer to them collectively as "Porter."

[2] Subsequent undesignated statutory references are to the Code of Civil Procedure. "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

is protected activity under section 425.16, subdivision (e). The trial court denied the motion, concluding that Greenfield's claim arises from Porter's plan to build the house, not the process of obtaining permits for the house.

We agree. While Porter's pursuit of a building permit might evidence his intention to build the house, it does not provide the basis for Greenfield's claim. Greenfield's nuisance claim arises from the prospect of an obstructed view, not from Porter's act of seeking a building permit. Porter therefore failed to meet his burden to show that the claim at issue arises from protected conduct under the first step of the anti-SLAPP procedure, and the trial court properly denied Porter's anti-SLAPP motion on that ground.

BACKGROUND

1. The Anti-SLAPP Procedure

Section 425.16 provides for a "special motion to strike" when a plaintiff asserts claims against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) Such claims must be stricken "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the "moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).) At this stage, the defendant must make a "threshold showing" that the challenged claims arise from protected activity. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.)

Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra*, 1 Cal.5th at p. 396.) Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Ibid*.) The plaintiff's showing must be based upon admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Section 425.16, subdivision (e) defines the categories of acts that are in "furtherance of a person's right of petition or free speech." Those categories include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1)–(2).)

An appellate court reviews the grant or denial of an anti-SLAPP motion under the de novo standard. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).)

2. Greenfield's Claim

Greenfield's complaint (Complaint) asserts a single claim for nuisance. The Complaint alleges that Porter applied to the City of Los Angeles Planning Department (Planning Department) for approval to construct two, two-story houses on property adjacent to Greenfield's house. Greenfield learned of the project when he received a notice of public hearing from the City of Los Angeles Zoning Administrator.

After hiring a lawyer and an architect, Greenfield determined that the plans for Porter's houses would impinge on his views. The lawyer and architect met with Porter "the day before the public hearing" to ask that Porter consider redesigning the project to avoid or minimize the view blockage. The Complaint alleges that Porter said he would ask the zoning administrator to put the case on hold so that he could prepare new plans, "taking into consideration the concerns of [Greenfield] about view blockage and other matters." Porter allegedly made such a request at the hearing.[3]

The associate zoning administrator who presided over the hearing "put the case on hold." About six months later, Porter submitted revised plans, which Greenfield claims "would be far more harmful" to his views. Greenfield alleges that Porter "designed, or caused to be designed, a house that maximized blockage of views from [Greenfield's] Property, with the sole or primary purpose being to block those views and destroy the sense of openness enjoyed by the occupants of, and visitors to, [Greenfield's] residence, and to diminish the value of [Greenfield's] property, either as retaliation against [Greenfield] for opposing the House Project, or as a tool to secure leverage against [Greenfield], or as mere spite against [Greenfield]. Porter allegedly submitted his revised plans to the zoning administrator

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[3] In his declaration in support of the anti-SLAPP motion, Porter disputed this version of events. He claims that he planned to proceed with his plans "as is" at the hearing, but the zoning administrator decided to continue the hearing to permit Porter to address various problems. The dispute is not material to this appeal.

with "full knowledge" of the "enormous negative impact that the structure reflected in the Revised Plans would have on views from [Greenfield's] Property."

The Complaint alleges that Porter's planned house amounts to a " 'spite fence' " that is unlawful under Civil Code section 841.4. It alleges that an "actual controversy has arisen and now exists" as to whether Porter's project "constitutes a 'spite fence' or a nuisance." In support of the assertion that "there is a probable and imminent danger that [Porter] will construct and maintain the nuisance," the Complaint alleges that Porter, "by pursuing permits for the House Project and by refusing to redesign the House Project so as to remove or even reduce the size of the spite fence herein alleged, [has] unequivocally stated [his] intention to construct the spite fence upon receiving permits from the City." The Complaint seeks relief in the form of a declaration that Porter's planned house is a "spite fence and a nuisance"; an injunction prohibiting construction or maintenance of such a spite fence adjacent to Greenfield's property; and for damages for Greenfield's "investigation and enforcement" costs and for the diminution in value of Greenfield's property.

3. Porter's Anti-SLAPP Motion

Porter responded to the Complaint with a motion to strike under section 425.16. After permitting preliminary discovery, the trial court denied the motion.

The court ruled that Porter's claim did not arise from protected acts under section 425.16, subdivision (e). The court concluded that Greenfield's allegations concerning Porter's submission of plans to the zoning administrator "merely set forth the evidence, in part, demonstrating [Porter's] intent to develop a property by building two homes that [Greenfield] contends will constitute a nuisance." The court concluded that "[t]he wrong

complained of is the planned construction of two houses which [Greenfield] contends will constitute a nuisance, not [Porter's] attempts to obtain permits to build."

DISCUSSION

1. A Claim Arises From Protected Conduct Only If the Protected Conduct Supplies an Element of the Claim

As our Supreme Court recently reiterated, to show that a claim arises from protected activity under section 425.16, subdivision (b)(1), it is not sufficient to show that the claim "was filed after, or because of, protected activity, or when protected activity merely provides evidentiary support or context for the claim." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621 (*Rand*).) "Rather, the protected activity must 'supply elements of the challenged claim.' " (*Ibid.,* quoting *Park, supra,* 2 Cal.5th at p. 1064.)

In *Rand,* the court considered an anti-SLAPP motion directed to a number of claims relating to the City of Carson's contract to use the plaintiff (Rand) as its exclusive agent to negotiate with the National Football League for a football stadium. One of those claims, for promissory fraud, was based on alleged false oral assurances that the contract would be extended. (*Rand, supra,* 6 Cal.5th at pp. 617, 626.) In a communication shortly before the Carson City Council voted against an extension, a city official allegedly told Rand that the city did not need the extension and would not be extending the contract. (*Id.* at p. 628.)

Our Supreme Court concluded that this statement involved "protected activity (speech in the form of an oral statement) relating to an issue considered by a legislative body (renewal of the [contract])." (*Rand, supra,* 6 Cal.5th at p. 628.) However, this

was not enough to strike the claim under the anti-SLAPP statute. The statement might have been evidence of bad faith, but it was not itself the basis of liability. Rather, the city's alleged *conduct* in wrongfully refusing to renew the contract was the basis of Rand's promissory fraud claim, "even without the prior communication." (*Ibid.*)

In *Park*, the court similarly explained that "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at p. 1060.) In that case, the plaintiff had asserted a discrimination claim after he was denied tenure. The court held that the plaintiff's claim arose from the decision denying him tenure, not from speech in connection with a grievance procedure or the tenure process. The alleged communications constituting the protected speech activity might have served as evidence of discrimination, but they were not an element of the plaintiff's claims. (*Id.* at p. 1068.)

In *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (*Cotati*), the court held that a city's declaratory relief lawsuit concerning a mobilehome park rent stabilization ordinance did not arise from the protected conduct of mobilehome owners in filing an earlier federal lawsuit challenging the ordinance. The court explained, "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*Id.* at p. 78.) The claim at issue concerned the constitutionality

of the underlying ordinance, not the owners' prior lawsuit. (*Id.* at pp. 79–80.)

This court's prior decision in *Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686 (*Mission Beverage*) is also relevant here. In that case, this court held that a beer distributor's claims against its supplier for alleged wrongful termination of the distributorship agreement did not arise from protected conduct. The court rejected the argument that the distributor's claims arose from protected conduct in the form of the supplier's letter terminating the agreement (which was preparatory to statutorily required arbitration). Rather, the distributor's claims arose from the supplier's *decision* to terminate the contract, not the letter communicating that decision. The court explained that "where a plaintiff's claim attacks only the defendant's decision to undertake a particular act, and if that decision is not itself protected activity, that claim falls outside the ambit of the anti-SLAPP statute." (*Id.* at p. 701.)[4]

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[4] Porter argues that the reasoning in *Mission Beverage* is flawed because, unlike cases involving decisions by government entities, the supplier's decision in that case was simply a "thought" and was not itself actionable. Porter claims that the supplier's decision was only actionable when it was given effect by the termination letter. We reject the argument, which misses the point of the analysis in *Mission Beverage.* The point is that the supplier's letter simply communicated the alleged actionable conduct, which was the termination of the agreement. Like the communications at issue in *Park,* the alleged wrong was the decision to proceed down a particular path—denial of tenure in *Park* and termination of the contract in *Mission Beverage.* (*Park,*

2. Greenfield's Claim Does Not Arise From Protected Conduct

Greenfield does not allege any claim based upon Porter's conduct before the Planning Department. He does not, for example, assert a tort claim alleging fraud, misrepresentations or other improprieties in connection with that process. Rather, Greenfield asserts a claim for nuisance, seeking declaratory relief, an injunction, and damages. The elements of that claim have nothing to do with petitioning activity.

Greenfield relies on Civil Code section 841.4, which addresses the construction or maintenance of a particular type of structure "for the purpose of annoying the owner or occupant of adjoining property." The statutory elements of the claim do not include any statements or other communicative conduct at all, much less any speech or petitioning conduct that is protected under Code of Civil Procedure section 425.16, subdivision (e). Greenfield's claim therefore does not arise from Porter's protected petitioning conduct.

Porter argues that Greenfield's claim arises from petitioning conduct because the claim would not exist without it. Porter argues that the permit process provided the basis for Greenfield's contention that an actual, justiciable controversy exists and for Greenfield's allegations that Porter acted with the purpose of annoying Greenfield in his redesign of the house. This

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supra, 2 Cal.5th at p. 1068; *Mission Beverage, supra,* 15 Cal.App.5th at p. 701.) The communications expressing those decisions evidenced the claims but were not the bases for the claims.

argument confuses the legal basis for Greenfield's nuisance claim with the evidentiary support for the claim.

The Complaint alleges that Porter's pursuit of permits shows his unequivocal "intention to construct the spite fence upon receiving permits from the City." Porter's pursuit of permits might provide evidence that Porter intends to build the structure, but it does not provide a necessary element of Greenfield's claim. One might demonstrate an intent to build an offending structure through any number of ways having nothing to do with petitioning activity, such as preparing final plans, engaging a construction firm, or laying the groundwork for construction. It is the planned construction, not the application for permits, that is the basis for Greenfield's claim.

Greenfield's allegations concerning Porter's redesign of the house are similarly evidentiary in nature. The Complaint itself refers to Porter's plans for the redesign as evidence of his intent. Paragraph 37 of the Complaint alleges that "[a]s *evidence* that Mr. Porter and his contractor/architect initially designed a structure that would not completely block [Greenfield's] views and then pushed it upward at least 8 feet so as to block those views, the Revised Plans reflect a design that is curiously out of synch with the surrounding topography." (Italics added.) Moreover, the redesign itself was not even protected activity. While the design had to be approved, it is the design that Greenfield claims shows Porter's intent, not Porter's petitioning conduct.

Nor does Greenfield's claim arise from petitioning activity simply because Porter's house may not be built without a permit. If that were so, any claim challenging the design, construction or environmental impact of a building would arise from protected activity simply because a permit was necessary for the building.

The incidental need for a permit does not change a construction dispute into a claim arising from protected petitioning activity. (See *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 794 [governmental development permit applications were merely incidental to the plaintiff's breach of contract and fraud claims concerning Wal-Mart's construction of a store that blocked plaintiff's street access].) As our Supreme Court explained in *Rand,* the anti-SLAPP statute does not "swallow a person's every contact with government." (*Rand, supra,* 6 Cal.5th at p. 630.)

Porter cites *CKE Restaurants, Inc. v. Moore* (2008) 159 Cal.App.4th 262 (*CKE*) and *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459 (*Lunada*) as support for his argument that Greenfield's claim arises from Porter's conduct in pursuing building permits because it *resulted* from that conduct. In each of those cases the plaintiff sued after the defendant had served a notice that was a statutory prerequisite for filing a lawsuit. In *CKE* the defendant had served notice under Proposition 65 that the plaintiff's food contained a carcinogen; in *Lunada* the plaintiff had served a demand letter required before filing suit under the Consumer Legal Remedies Act (CLRA). In each case, the court concluded that the plaintiff's claims arose from petitioning conduct.

The critical distinguishing feature in those cases is that the plaintiffs' lawsuits were preemptive actions that directly targeted the plaintiffs' petitioning conduct; i.e., their statutorily required prelitigation notices. (See *CKE, supra,* 159 Cal.App.4th at p. 271 ["CKE directly challenged the merits of the 60-day notice by referring to and quoting from the 60-day notice . . . . Instead of using the 60-day [notice] period to avoid litigation, CKE used it to commence litigation]; *Lunada, supra,* 230 Cal.App.4th at p. 475

[plaintiff alleged that " '[t]his action is being filed because Defendants threaten to file a lawsuit claiming that Plaintiff's advertising violates [the CLRA]' "].) Here, Greenfield does not target or challenge Porter's petitioning conduct. Rather, he challenges Porter's intention to build a house that Greenfield claims will constitute a nuisance.[5]

Porter is also wrong in suggesting that *Greenfield's* motives and alleged use of the planning process to intimidate Porter provide a basis to conclude that *Porter's* petitioning conduct is the basis for his claim. Greenfield's intent in filing his lawsuit is irrelevant to whether his claim arises from Porter's protected conduct. (*Cotati, supra,* 29 Cal.4th at p. 78.)

Thus, Greenfield's claim does not arise from protected conduct. At best, Porter's arguments support a theory that

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[5] In a supplemental letter following oral argument, Porter also cites the recent decision of the Sixth District in *Laker v. Board of Trustees of the California State University* (Feb. 28, 2019, H044836) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 169]. Nothing in the court's opinion in that case is inconsistent with our decision here. The court applied the same standard that our Supreme Court articulated in *Park.* The court explained that a claim may be struck " 'only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.' " (*Laker*, at p. *19, citing *Park, supra,* 2 Cal.5th at p. 1060.) The court applied that standard in concluding that a defamation claim that challenged *statements* made in connection with a statutorily mandated investigation was based on protected conduct, but that a claim for retaliation based on the *decision* to pursue allegedly meritless investigations did not. (*Laker*, at pp. *27–*28, *45–*46.)

Greenfield's action was "filed after, or because of," Porter's petitioning activity, and that the petitioning conduct "provides evidentiary support or context for the claim." (*Rand, supra*, 6 Cal.5th at p. 621.) That is not sufficient for anti-SLAPP relief. The trial court therefore properly denied Porter's anti-SLAPP motion.

DISPOSITION

The trial court's order is affirmed. Greenfield is entitled to his costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.